

DRAFT/01/08/10

PREDECISIONAL/DO NOT RELEASE

SUBJECT: BDCP Purpose and Need Statement

TO: David Nawi
Letty Belin

FROM: Tom Hagler

Summary

I have previously spoken briefly to each of you about this issue, but would like to give you some more information informally before this becomes a more vigorous public discussion.

We have received from DWR through the Corps a draft “purpose and need” statement for the CWA 404 permitting process anticipated to be required for the BDCP.

That purpose and need statement says, in its most operative language (Full statement is attached below), that the purpose of the BDCP is to “...restore and protect the ability of the SWP and CVP to *reliably divert and deliver water up to full contract amounts.....*”

Although this may seem innocuous at first glance, what this is really proposing is a significant increase in diversions out of the Delta. This is because the “full contract amounts” are significantly more than the amount of water actually diverted from the Delta historically. In fact, what this P+N is saying is that this project’s purpose is to “reliably divert and deliver” more than 1 million acre feet of water out of the Delta *than has ever been diverted in the past*.

See the numbers below.

This language is new (see the “evolution” of the P+N discussed below), and it is unclear from my discussions with some of the BDCP participants whether it has been vetted with the Steering Committee. It is clearly marked as a non-public draft, so I think it is still something that can be changed.

I have two sets of concerns about this language. First, it is problematic in a narrow legal sense under both the NEPA and CWA 404 programs, because it impermissibly constricts the alternatives analysis under those two programs. The second, and, I think, more serious issue given recent developments in the BDCP and the Legislature, is that it states a policy of increasing diversions out of the Delta at

precisely the same time that the Legislature, Delta Vision, and significant outside reviewers have proposed reducing reliance on the Delta.

This second issue, which I will discuss below, is primarily a policy issue. It is particularly ripe for federal discussion at this time, given that the new administration is in the process of defining how it will engage in the BDCP and in California water issues generally. As you know, it is a highly visible issue, with strong opinions on all sides.

We can discuss this at your convenience, although there are meetings planned between DWR, some BDCP representatives, and the 404 regulators during the week of January 11.

Discussion

I. Evolution of the BDCP Purpose and Need Statement

A. The Planning Agreement (October 6, 2006; as revised March 19, 2009):

“Allow for projects to proceed that *restore and protect water supply*, water quality and ecosystem health within a stable regulatory framework.” (at p. 7)

B. Under the original NOI (January 24, 2008; by NOAA and USFWS)

“...Allow for projects that *restore and protect water supply*, water quality, ecosystem, and ecosystem health to proceed within a stable regulatory framework....”

C. Under the first amended NOI (April 15, 2008)

“Specifically, Reclamation seeks to *improve water supply reliability* for its Federal water contractors, while meeting its FESA obligations.”

“...The BDCP will have several core purposes:...conveyance facilities to *enhance operational flexibility and water supply reliability*, while providing greater opportunities for habitat improvements....water operations and management actions to achieve conservation and water supply goals....Additional core purposes of the BDCP are....to *provide for and restore water quality, water supplies*, and ecosystem health within a stable regulatory framework....”

D. Under the third and final NOI (February 13, 2009):

“....*Restore and protect the ability of the SWP and CVP to deliver up to full contract amounts*, when hydrologic conditions result in the availability of

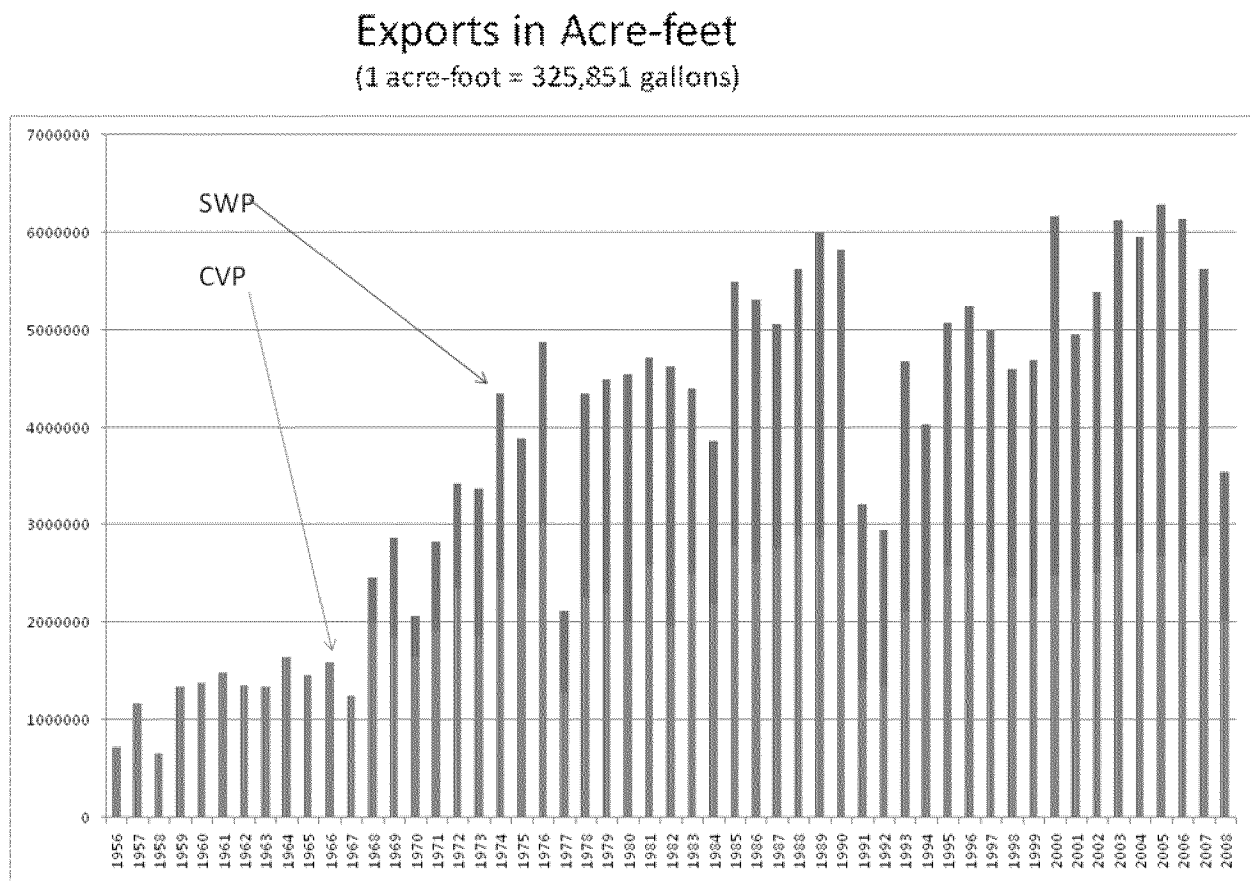
sufficient water, consistent with the requirements of state and federal law and the terms and conditions of water delivery contracts....”

E. Under the DWR submission to Corps 404 Regulatory (the current proposal)

“....restore and protect the ability of the SWP and CVP to *reliably divert and deliver water up to full contract amounts.....*”

II. Full Contract Amounts for Exports and Historical Deliveries

A. The following chart shows CVP and SWP exports over the relevant historical period.



B. "Full Contract Amounts" For Export-Dependent Contractors

The State Water Project contract amount is 4,171,996 AF, per the DWR December 1, 2009 press release. South of Delta CVP Water Rights Contractors (Exchange Contractors plus Contra Costa Water Rights Contracts) have full contract amounts totalling 893,277 AF and South of Delta CVP water service contractors (Contra Costa, DMC and SLC, San Felipe, San Luis and Cross Valley) have full contract amounts totalling 2,367,610. (Footnote: These numbers are from a CVP-

produced briefing binder from the 1990's. The current numbers may be a little different, but they are certainly in the ball park).

Combined, the SWP and CVP full contract amounts for Delta exports are around 7,432,883 AF. As noted above, historical exports by the CVP and SWP almost never exceed 6 MAF, so it appears that **the full contract amount is at least 1 million acre feet more of exports than has ever been exported historically.**

This total does not include water transfers, north of Delta to south of Delta. Most observers support the use of water transfers to shift water to its highest and best use, but north to south transfers still involve an export out of the Delta. What is unclear is how much transfer activity is underway, and how much of it involves transfers of CVP south of Delta contract water (the transfer of which would not increase overall exports from the Delta).

Why is there such a divergence between the "full contract amount" and the historical deliveries? There are many reasons for this, and some overheated rhetoric. But the most common explanations are:

(1) The SWP wrote many older contracts assuming a full build out of the source area part of the system, and those diversions from Northern California coastal streams never came to pass.

(2) The CVP developed its "water availability" estimates using unrealistic assumptions.

(3) For much of the historical period, the facilities did not have the ability to pump and store the full contract amounts. That may or may not still be true today.

(4) Generally, demand for export water is lower in wetter years when water is available from local sources.

III. The Policy Trend is Away from Increasing Delta Exports

A. The Legislature

New Section 85021, which came out of SB1-7X (sometimes called the policy bill) says, in part:

"The policy of the State of California is to reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency. Each region that depends on water from the Delta shall improve its regional self-reliance for water through investment in water use efficiency, [etc etc.]"

B. The Delta Vision Process

“...[T]he Task Force recommends...a two-channel approach....Increased storage capacity, surface and ground, plus changed operations are also required to improve water supply reliability. Concurrently, Californians need to become less dependent on water supply from the Delta, both the reduce risk from a failed Delta conveyance system and to reduce risks to the ecosystem.” Strategic Plan, at vi (October 2008).

C. Public Policy Institute of California

“ However, a peripheral canal alone will fix neither the Delta nor California’s water supply issues, and it is unlikely to improve native fish populations enough to allow immediate increases in exports above currently restricted levels.” P. 11, California Water Myths, PPIC (December 2009).

BAY DELTA CONSERVATION PLAN

PURPOSE STATEMENT

BASIC PURPOSE

The Bay Delta Conservation Plan (BDCP) comprehensively addresses the ongoing decline of the Sacramento-San Joaquin Delta (Delta) ecosystem and uncertainty regarding water supply reliability. The integrated purposes of the BDCP are to: 1) protect, restore and enhance aquatic, riparian, and associated terrestrial natural communities, ecosystems, and certain listed species by reducing the adverse effects associated with the State Water Project (SWP) and Central Valley Project (CVP) diversion of water from the south Delta; and 2) restore and protect the ability of the SWP and CVP to reliably divert and deliver water up to full contract amounts, when hydrologic conditions result in the availability of sufficient water, consistent with the requirements of state and federal law and the terms and conditions of water delivery contracts held by SWP contractors and certain members of San Luis & Delta Mendota Water Authority (SLDMWA).

OVERALL PURPOSE

The overall purpose of the BDCP is to establish a systematic framework to restore and enhance ecological conditions in the Delta to benefit listed and non-listed aquatic and terrestrial species, designated in accordance with the federal Endangered Species Act and California State Endangered Species Act, and to secure authorizations that would allow projects that restore and protect water supplies, water quality, and ecosystem health to proceed within a stable regulatory structure. This would be accomplished by establishing additional CVP and SWP water diversion facilities in the north Delta, reducing the loss of listed and non-listed fish at existing south Delta water diversion facilities, restoring and enhancing ecological conditions by re-establishing tidal inundation of selected lands within and adjacent to the Delta, increasing the frequency and duration of flooding in existing floodways, modifying land use and habitat management practices to enhance habitat values, and implementing actions to relieve other stressors that may contribute